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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 38

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, Trustees of the Property of The New York, New Haven and Hartford Railroad Company, Debtor,

Petitioners,

—against—

CONNECTICUT RAILWAY & LIGHTING COMPANY,

Respondent.

Petition of Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, Trustees of the Property of The New York, New Haven and Hartford Railroad Company, Debtor, for a Rehearing and

Motion that the Issuance of this Court's Mandate be Stayed Until the Final Disposition of the Case.

JAMES GARFIELD
HERMON J. WELLS
Attorneys for Petitioners.

January 29, 1941

PRESS OF GEO. H. ELLIS CO., BOSTON

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Now come the petitioners, Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, as they are Trustees of the property of The New York, New Haven and Hartford Railroad Company, Debtor, by James Garfield and Hermon J. Wells, their attorneys, and respectfully pray for a rehearing of this case and a stay of mandate until final disposition thereof.

The fundamental issue before this Court was whether proof of loss for a portion of the unexpired term of a rejected lease is sufficient to establish injury and fix damages for the whole remaining term. The record contained no evidence as to the earnings or value of the unexpired term except the past earnings of the leased property. The District Court had denied recovery because there was nothing to show that earnings in the long future might not be sufficient to wipe out the current loss. The Circuit Court of Appeals had allowed as damages the difference between rent and earnings for eleven years (including eight future years for which it was willing to forecast earnings) and had "disregarded" the balance of the term.

In affirming the judgment of the Circuit Court of Appeals this Court held that proof of the loss for the first eleven years constituted proof of the fact and amount of loss for the entire unexpired term, "since the presumption is that the rent and rental value for the remainder of the term are the same". This presumption is stated to be based upon the assumption that at the time the lease was made "the parties thought the annual rent reserved and rental value were the same".[1]

It is respectfully submitted that this presumption should not be invoked for the following reasons:

I. Resort to such a presumption to aid in the proof of future losses for anticipatory breach of long term contracts is a new departure which would work a fundamental change and create uncertainty in the law of damages.

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[1] 85 L.Ed. 283, 287; 61 S. Ct. 379, 383.

II. Uncertainty as to what presumption this Court intended to invoke will further confuse the law.

III. The decision would apply against innocent parties in reorganization and bankruptcy proceedings a presumption the only reason for which is to prevent a wrongdoer from escaping the consequences of his wrong.

IV. Resort to any such presumption to facilitate allowance of damages to a landlord is inconsistent with Section 77.

I.

Any presumption on which this Court squarely rests a decision acquires an authority for the lower Federal courts and a sanctity in other courts which will immediately establish it as a part of the general law.

Damages have for a long time been allowed for loss of future profits on anticipatory breach of executory contracts if they could be proved with sufficient certainty. The requirements of proof have become thoroughly established in both the Federal and the state courts. When the Bankruptcy Act was amended to make provable claims for loss of future rent under unexpired leases the same rules were held to apply as in other executory contract cases.[2] In its first opinion in this case this Court noted that "the difficulties of proof are well recognized", citing the Pennsylvania Steel Company cases in which damages had been dis-

[2] "The difficulties of proof are well recognized. The same rules apply to executory contracts." *Connecticut Railway & Lighting Co.* v. *Palmer*, 305 U.S. 494, 505. The statute (Section 77(b)) expressly provides the same treatment for unexpired leases as for other executory contracts.

allowed under 999 year leases because the amount was uncertain "and there was no method of making it certain".[3] It also pointed out that "the uncertainty as to the loss entailed by the abrogation of leases . . . (grows) greater as to the remainder of the term lengthens" and that the difficulties of proof are multiplied when future values must be determined in times of economic depression."[4]

In thus recognizing that there were established rules for proving future damages for loss of long term contracts, this Court gave no hint that the "difficulties of proof" might be avoided by invoking a presumption of equality between rent and rental value which would make it just as easy to prove under a long term as a short term contract. The possibility that in any given case such "difficulties" might result in a claimant's failing to produce "evidence which satisfies the mind" of the court was clearly recognized and the penalty for such failure was stated to be disallowance of damages.[5]

If in its second opinion in the same case the Court invokes a presumption as a substitute for proof, other courts will have great difficulty in knowing how to deal with problems of future damages. The only evidence here consists of past earnings. Does use of the "presumption" mean that other testimony is not necessary, that the proof need not go beyond past earnings? Is the plaintiff thus assured of some damages in all cases where he shows loss between the date of repudiation and the date of hearing? Is he relieved of all "the diffi-

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[3] *Pennsylvania Steel Co.* v. *New York City Railway Co.*, 198 Fed. 721, 759.

[4] 305 U.S. *supra*, p. 505.

[5] "only those damages susceptible of definite proof should be allowed" 305 U.S. *supra*, p. 502.

culties of proof", or only of some of them? Is he excused from the exercise of diligence in seeking to establish his loss? What rules are the courts to follow with regard to the distance into the future for which they may predict the continuation of losses?*

These and many other problems of a novel character will confront the courts wherever damages are sought for more than a very brief unexpired term. The practical result will be a change in the law of damages permitting the plaintiff to shift the burden of proof to the defendant whenever it becomes difficult, or even inconvenient, to sustain and permitting the court to remake a contract at the behest of one party without the consent of the other.

While this case arises under Section 77 of the Bankruptcy Act and relates to a lease of real estate, there is nothing in the Court's reasoning to prevent application of the presumption to any case involving damages for future loss under any executory contract with more than a short time to run.

II.

The confusion resulting from a fundamental modification in the law of damages will be increased by the uncertainty as to exactly what presumption was invoked in this case. The presumption is said to be based on the expectations of the parties at the time the lease was made that "*for the long years ahead* the rent and

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*In the instant case the Circuit Court of Appeals selected eight years though admitting that there was no necessary reason for just that number (R. 299-300). In *Old Colony Railroad* v. *New York New Haven and Hartford Railroad Co.* (98 Fed. 670, 672) the same court intimated that future damages might be allowed "for a period of say five or ten years, on the theory that present estimates for as long as that might have some validity."

the rental value are the same.'" This seems to mean that rent and rental value were expected to be equal for the term of the lease as a whole.

When it comes to the application of the presumption, however, the opinion seems to depart from the basic assumption upon which it was predicated, saying that "the presumption is that the rent and rental value *for the remainder of the term* are the same" and that therefore damages measured by the deficiency of rental value under the rent for a portion of the remainder may be taken as representing damages for the entire remainder.[8] Thus, the basis for the presumption would make it applicable to the entire term of the lease rather than to any fraction thereof, but the application would make it applicable to whatever fraction the Court might be considering.

The presumption is of course one of fact rather than law and is therefore rebuttable in fact. As it is stated to arise from the parties' expectation at the time the lease was made, the "fact" depends upon just what that expectation may reasonably be supposed to have been. However reasonable it may be to assume that in making a long term lease or contract the parties expected rental value to equal rent, it certainly cannot be supposed that reasonable business men expected such equality to obtain in each year or other fraction of the term. Experience shows that the factors which enter into the fixing of rental value vary from time to time both with the swings of general prosperity and depression and with the fortunes of the particular industry, locality

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[7]85 L. Ed. 283, 287; 61 S.Ct. 379, 383-4, italics ours.

[8]Idem, italics ours.

or property. Rent ordinarily is a fixed sum which does not change from year to year. If, therefore, the parties are to be assumed to have expected that the equality between rent and rental value would apply to the term as a whole, they must also be assumed to have expected that one would be higher than the other in some parts of the term and lower in other parts.

Such being the reasonable interpretation of the parties' expectation, it is obvious that the presumption to be based on it must be that while rent and rental value will be equal for the term as a whole, rental value will vary from time to time, and will be less than rent in some years and more in others. This would mean that the parties expected that there would be periods of deficiency of rental value under rent, and that such deficiencies would be offset by periods of excess, so that over the term as a whole there would be equality. If a Court is to rely upon such a presumption, it cannot, we respectfully submit, carve out from the term a short period when earnings or rental value are less than rent and award damages for that deficiency, because by the very terms of the presumption the parties anticipated just such periods. Moreover, if the record shows that there is already an accumulated deficiency of rental value under rent (as it does in this case[9]), this presumption would lead to the conclusion that in the future such deficiency will be made up by an aggregate excess of rental value over rent.

In the case at bar there are three periods involved: (1) from the execution of the lease to its rejection (30 years); (2) from rejection to the end of the period for which the Circuit Court of Appeals awarded damages

[9] R. 271-275; Ex. Y-1 to 4, R. 256-260.

(11 years); (3) from then until the termination of the original lease (958 years).

The majority opinion assumes that the parties expected that for the whole term, i.e. from the beginning of period (1) to the end of period (3) rent would equal rental value. At the same time it makes the further assumption that in period (3) rental value will equal rent. The record shows that in period (1) rental value was less than rent. Applying both presumptions to the facts of record would necessarily lead to the conclusion that in period (2) rental value would exceed rent, a conclusion directly contrary to the decision allowing the claimant damages for that period.

If damages are to be allowed for period (2) it is impossible to justify both the presumption of equality of rent and rental value for the term as a whole and the presumption of such equality for period (3). Either it must be presumed that there will be equality for the entire term, in which case period (3) will show an excess of rental value over rent and no damages can be allowed for period (2), or it must be presumed that rent and rental value will be equal for period (3) but not for the term as a whole, a presumption which has no basis in fact and indeed is directly contrary to the basic assumption of fact made by this Court as to the expectation of the parties at the time they made the lease.

Thus the two presumptions cannot both be applied and the only one which has any basis in fact leads to a denial of damages. Only confusion can result in other cases from allowing this decision to stand.

Moreover since in this case the parties agreed that until retirement of claimant's bonds in 1951 the rent should be twice what it was to be thereafter (305 U.S. supra p. 495) they must have expected that the aggregate rental value might be less than the aggregate rent up to 1951 and on the assumption that they expected the two to be equal over the whole term it follows that they must have expected any deficiency before 1951 to be made up thereafter.

III.

This presumption, as we have said, is entirely novel in the law of damages for executory contracts. The only authority cited for it is Section 610 of Sedgwick on Damages. That section says that "where there is no sufficiently certain proof of the amount of damages, nominal damages only are recoverable; the burden being on the plaintiff to prove the amount of damages." After citing various cases where damages were held to be too remote and uncertain to be estimated, the author continues, "It is, however, to be noticed that in such a case every reasonable presumption is to be made against the wrongdoing defendant, and if by the aid of such presumption the damages can be fixed the plaintiff may recover substantial damages."

The reason for invoking presumptions in such cases is to prevent a "wrongdoing defendant" from escaping the consequences of his wrong. As between an innocent and a guilty party, it is natural and right that the courts should try to see that the innocent does not suffer because of difficulties of proof.[10] But the doctrine that a wrongdoer shall not get off with nominal damages merely because the precise measure of the plaintiff's loss is difficult to establish has no application to pro-

[10]Such a situation is well illustrated in the single case cited in Sedgwick as authority for the sentence last above quoted. It is also the basis of this Court's decision in *Westinghouse Co.* v. *Wagner Co.*, 225 U.S. 604 discussed in *Sheldon* v. *Metro-Goldwyn Corporation*, 309 U.S. 390, 403, wherein it is stated that in a patent infringement suit when the plaintiff had shown the infringer's profits and the defendant had proved that part of the profits had been produced by added and non-infringing improvements, the burden of proof shifted back to the plaintiff to show what part of the profits had resulted from the infringement. The court found that as the defendant had made it "not merely difficult but impossible to carry the burden of apportionment" the whole indivisible profit must go to one party or the other, and the law would not permit it to go to the wrongdoer.

ceedings where the issue is between parties none of whom is guilty of any wrong.

In the instant case, for example, there is no "wrong-doing defendant". The lease was not rejected by the lessee or by those who will be required to pay if respondent is allowed to recover damages,[11] but by agents of the Bankruptcy Court acting on that Court's advice and with its consent. The controversy is between one who seeks to prove as an unsecured creditor, despite the fact that he has received back his entire property,[12] and all of the other unsecured creditors. The latter do not get their property back but must be content with dividends on their claims. If the repossessing landlord is also permitted to share in the debtor's estate, the dividends of the other creditors will be further reduced.

This result, we respectfully submit, was not contemplated by Sedgwick and should not be brought about by substituting for proof of actual loss a "presumption" intended only for protection against wrongdoers.

IV.

The commonly accepted formula for damages for loss of future rent is "the difference between the rental value of the remainder of the term and the rent reserved, both discounted to present worth."[13] That is the measure for which respondent contended at the first trial in this case and the measure approved by

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[11] Division Four of the Interstate Commerce Commission has found that there is no equity for existing stockholders. (*N.Y., N.H. & H. RR Reorganization*, 239 I.C.C. 337, 418.)

[12] Actually respondent has received more than its original property to the extent of additions and sinking funds paid for by the lessee and forfeited upon termination of the lease. See *Connecticut Railway & Lighting Co.* v. *Palmer*, 305 U.S. *supra*, p. 505.

[13] *City Bank Co.* v. *Irving Trust Co.*, 299 U.S. 433, 443.

this Court on the first appeal.[14] It is also the measure urged by respondent at the second trial, except that he did not ask the court to go beyond forty years into the future.

There is nothing in the statute,[15] however, which requires that damages be determined by reference to "rental value" as such. In computing the loss for rejection of a lease "rental value" is a convenient concept for describing the subtrahend, but it should not be permitted to conceal what the majority opinion recognizes as "the final objective of the proof", namely "not how much the remainder is worth now but what damages the lessor has suffered".[16]

A landlord whose lease has been rejected loses the right to receive the rent reserved therein for the balance of the term and in its place receives back his property with the right to use or dispose of it as he sees fit. He does not have to relet it. He may sell it or operate it himself. He suffers no "actual damage" unless the greatest value which may reasonably be realized out of the property during the time for which he has regained it is less than the rent reserved in the lease. Rental value is only one, and not necessarily the largest, aspect of true value.

The landlord may therefore prove his damages by any proper evidence of value. If the term is not too long, he may succeed in persuading the judge to estimate earnings or other value for the entire balance. If it extends far enough into the future, he may be able to convince the court that the value of what he has re-

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[14] 305 U.S. *supra*, p. 504.

[15] Section 77 or any other section of the Bankruptcy Act.

[16] 85 L. Ed. *supra*, p. 287; 61 S.Ct. *supra*, p. 383.

covered is fairly represented by the value of the fee. In an intermediate case he may be able to show how the total value of the property should be allocated as between the term and the reversion. He is not limited to proving "rental value."

Perhaps this is what is meant by the statement in the majority opinion that "future rental value cannot be susceptible of precise proof".[17] If that statement means that *no* future value can be proved it is hard to reconcile with the Court's previous holding that the language added to Section 77 in 1935 was "intended to call emphatically to the attention of those administering the reorganization section the requirement that only those damages susceptible of definite proof should be allowed".[18]

If the landlord shall fail to produce evidence which satisfies the mind of the court that the value of the entire estate which he receives back will be less than the rent reserved, the purpose of the statute is not to see to it that he recovers some damages in addition to repossessing his property, but on the contrary to protect the estate, i.e., the other creditors, against his claim. He is not made a creditor merely by virtue of the fact that his lease has been rejected. The statute says that "any person injured by . ... rejection shall . . . be deemed to be a creditor . . . to the extent of the actual damage or injury".[19] Unless he can show "actual damage or injury," he is not even to be "deemed to be a creditor".[20]

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[17]85 L. Ed. *supra*, p. 287; 61 S.Ct. *supra*, p. 384.

[18]305 U.S. *supra*, p. 502.

[19]Bankruptcy Act, Section 77(b).

[20]The possible inference in the majority opinion (85 L.Ed. p. 287, 61 S.Ct. p. 383) that nominal damages might be recoverable in the absence of proof of "actual damage or injury" was probably not intended.

This Court has already held that the purpose of Congress in making claims for future rent provable and dischargeable was "directed generally at the rehabilitation of debtors."[21] It is therefore not to be assumed that landlords were the object of particular Congressional solicitude or are to be given greater rights than the statute plainly requires. They are deprived of their former right to treat their leases as still extant and hold the tenants for future rent as it accrues. In the case of railroad tenants, however, that right was valueless[22] because reorganization in equity by sale of assets to a new corporation left the landlord with a succession of future actions against an empty shell. In place of this worthless right, the landlord was given the possibility of sharing in the debtor's estate if he could convince the court that repossession of his property for the entire unexpired term of the lease would not make him whole for loss of the rent. This is precisely what respondent here has twice failed to do. And such failure, under the statute, leaves the landlord just where he would have been prior to the statute if he had elected to repossess his property instead of to treat the lease as continuing in effect.

The majority opinion notes that the Act gives a landlord a new right of recovery which is "an unsecured claim of the character of a claim for a deficiency above the value of inadequate collateral".[23] But this right arises not by virtue of the mere rejection of the lease, but only if the landlord has proved that he had suffered "actual damage or injury" thereby, in other words, only if he has proved with certainty the *fact* of damage.

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[21] 305 U.S. *supra*, p. 501.

[22] *City Bank Co.* v. *Irving Trust Co.*, *supra*, p. 437.

[23] 85 L. Ed. p. 289; 61 S.Ct. p. 385.

As the majority opinion holds, "Certainty in the *fact* of damage is essential."[24] Without it the landlord is not to "be deemed to be a creditor" because, for all the court knows, he may be better off with his property than he would have been with the rent. It is only after the "fact of damage" has been established that the right to participate in the debtor's estate arises and the question of the amount of such participation becomes important. When that right has been established, "Certainty as to the amount goes no further than to require a basis for a reasoned conclusion".[25]

We therefore submit that while a reasonable presumption might under some circumstances be sufficient to fix the *amount,* it cannot properly be used under this statute to establish the *fact,* of damage.

For the reasons stated above we pray that this Court will grant a rehearing and restore this case to its docket for reargument, or in the alternative will recall its decision of January 6, 1941, reverse the decision of the Circuit Court of Appeals and order the judgment of the District Court affirmed; and that in either event its mandate will be stayed until final disposition of the case.

JAMES GARFIELD

HERMON J. WELLS

Attorneys for Petitioners.

January 29, 1941

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[24]85 L. Ed. *supra,* p. 289; 61 S.Ct. *supra,* p. 385 (italics ours).

[25]Idem.

CERTIFICATE

I, James Garfield, of counsel for the petitioners, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

JAMES GARFIELD.

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P. 7.

SUPREME COURT OF THE UNITED STATES.

No. 38.—October Term, 1940.

Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, Trustees of the property of the New York, New Haven and Hartford Railroad Company, Debtor, Petitioners,
vs.
Connecticut Railway & Lighting Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 6, 1941.]

Mr. Justice Reed delivered the opinion of the Court.

This certiorari, which we allowed because of its importance, involves problems of proving a lessor's claim for damages for rejection of its lease in a proceeding under Section 77 of the Bankruptcy Act. The lease, demising respondent's street railway properties and equipment in Connecticut for 999 years from 1906, was rejected on December 18, 1935, by petitioners, the trustees of the debtor, the New York, New Haven and Hartford Railroad Company.[1] The annual rent reserved at rejection was close to $1,050,000 with tax, sinking fund, interest and bond retirement adjustments, which are not material to our discussion.

After rejection the lessor filed a claim for damages under subsection (b) of Section 77. The applicable provisions are as follows:

". . . . In case an executory contract or unexpired lease of property shall be rejected, . . . any person injured by such . . . rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings . . ."

The claim was allowed, limited to the damages accrued or which might accrue before the winding up of the reorganization. This

[1] The lease originally covered additional properties, but as to these the debtor no longer had an interest.

Court on a previous certiorari[2] disapproved that measure of damages and laid down as the measure "the present value of the rent reserved less the present rental value of the remainder of the term." On remand to the district court, the lessor undertook to prove damages according to the approved measure by introducing evidence of the present value (January 1, 1936), at four per cent discount, of the rent reserved under the lease for forty years only (to December 31, 1975). This amounted to around twenty million dollars. For a corresponding period evidence of rental value similarly discounted was offered. The difference was submitted as the damages for rejection. No proof of rent reserved or rental value beyond the forty years was offered as respondent was advised such proof would be too uncertain to carry conviction.

To prove rental value, respondent offered evidence of annual earnings for each of the forty years. These earnings were made up of the earning power of a sinking fund, plus an adjustment of the annual payments required by the lease to be made to the sinking fund, plus the operating profits of the transportation properties. For 1936-1938 the actual earnings were used. This was the period after rejection and before trial when the demised properties were operated by or for respondent. For 1939-1975 earnings were estimated by alternative calculations of average annual earnings, before federal taxes, over four prior base periods each ending December 31, 1938: (1) the preceding year and a half of 100% bus operation; (2) the three years of actual operation, following rejection, during which the transition from trolleys to buses had been completed; (3) ten years, 1929-1938, the accounts for which were partly reconstructed because before the reorganization the demised premises were utilized in conjunction with others not involved here; and, finally, (4) fourteen years, 1925-1938.[3] The earning power of the sums in the sinking fund and the annual payments to it were assumed to be fixed. To get the rental value, these two fixed sums were added to the operating profit calculated from each of the four base periods. Since earnings were erratic, varying from $78,000 to $775,000 in the fourteen-year period, the annual rental value for the future

[2] Connecticut Railway & Lighting Co. *v.* Palmer, 305 U. S. 493, 504.

[3] To fill out the data petitioner calculated the proportionate rent reserved and the actual earnings for the short period between the date of rejection, December 17, 1935, and January 1, 1936.

varied according to the base used. Likewise, the damages calculated for forty years showed a range of from nine and a half to thirteen and a third million. It is substantially correct to say that no evidence in disagreement with the base figures was produced for the petitioner. Nor did petitioner introduce any evidence on its part to establish a different amount of damages.

The district court refused to find future earnings by projecting the average earnings of any of the four base periods. It pointed out that in its view the 100% bus operation was too new and had coincided with too great a shrinkage of earnings to serve as a safe guide. The data for 1936-1938 were deemed unconvincing because they were derived in a substantial measure from trolley operations, now abandoned, and because the period was one of economic depression. The ten and the fourteen-year bases were disapproved as irrelevant because of trolley operation, and as speculative because of the impossibility of forecasting the relative frequency of profitable and unprofitable years from this past experience. The court pointed out that no evidence of transportation experts or surveys was offered to assist it in appraising possibilities of the development of the territory, of increased operating efficiency or the effects of consolidation.[4] Furthermore, the trial court was of the view that even with acceptable proof of annual rental value for forty years, or other period materially shorter than the unexpired term of the lease, no conclusion could be reached as to the present rental value of the remainder of the term, because that portion of the term beyond the reach of the proof offered might have profits or losses which would upset the calculations for earlier years. The district court then struck out the accrued damages of more than a million dollars allowed on the former hearing and set aside the provision of the same order permitting accrued damages to be proven up to the date of final hearing.

The circuit court of appeals was of the view that "in effect, the law for purposes of damages treats a lease with 969 more years to run as if it were only for a term within the reach of fairly definite forecast." It thought that the evidence of earnings over the fourteen-year experience was adequate to enable it to draw a reasoned conclusion as to probable earnings for eleven years. For the three

[4] See another New Haven long term lease, In re New York, N. H. & H. R. Co., 30 F. Supp. 541, where evidence of this kind appears.

years, 1936-1938, these were known; for the other eight years, the average annual earnings for the preceding 14-year period were adopted. An allowance of the damages at time of rejection was made in the amount of $4,411,837.61.[5]

The certiorari brings here the questions of whether proof of damages for a portion of an unexpired lease is sufficient to fix damages for the whole remaining term and whether the circuit court of appeals may allow damages on the sole basis of past earnings, evidence which the district judge has held does not satisfy his mind.

First.—Litigation over a 999-year lease naturally brings up incidents difficult to reconcile with known and established legal formulae. Since conveyancers and business men alike have long utilized the characteristic provisions of leases to accomplish transfers of rights in real estate for extensive periods without payment of the purchase price, such long term agreements have become a well recognized legal implement, especially in corporate realty transactions and railroad consolidations and mergers. Its reservations of rent, provisions for taxes and operation are firmly embedded in our financial, corporate and title structures.[6] Business and government alike are accustomed to fix the rental value of property for long term leases and the value of the lease over and above the rent reserved at varying periods of the term.[7] In pending railroad

[5] The preciseness of this figure as to the amount of damage is illusory. It is obtained by accepting estimated interest rate and average earnings for eight years in the future, reduced to present cash value, as shown by respondent on a table covering forty years and deducting this from the agreed rent, discounted.

[6] Nearly forty thousand miles of road are leased by Class I railroads from 292 lessors. Class I roads operate over 93 per cent of all railroad mileage. Leased property represents over 15 per cent of this total. Over four billion dollars is invested in railroad property under lease. Tables 1, 129, 156 and 162. Statistics of Railways in the United States 1938. See Meck & Masten, Railroad Leases and Reorganization, 49 Yale Law Journal 626.

[7] Tax Cases: In many tax cases long-term leases have been valued, though frequently without any statement of the evidence or method used. Northern Hotel Co., 3 B. T. A. 1099, 1102; Newman Theatre Co., 4 B. T. A. 390; L. S. Donaldson Co., 12 B. T. A. 271; A. H. Woods Theatre Co., 12 B. T. A. 827; Consolidated Investment Co., 13 B. T. A. 1252; Hotel Wisconsin Realty Co., 16 B. T. A. 334; James Bldg. Co., 22 B. T. A. 658; Martha Realty Co., 22 B. T. A. 342, 344; People ex rel. Delaware & Hudson Canal Co. *v.* Feitner, 61 App. Div. 129; Appeal Tax Court *v.* Western Maryland R. R. Co., 50 Md. 274, 298; Philadelphia, W. & B. R. Co. *v.* Appeal Tax Court, 50 Md. 397; People ex rel. Gorham Mfg. Co. *v.* State Tax Comm., 197 App. Div. 852. Eminent Domain Cases: Matter of the City of New York: Beers *v.* Schlessinger, 120 App. Div. 700; In re Park Site, 247 Mich. 1. Contract Cases: Bondy *v.* Harvey, 218 App. Div. 126; Williams *v.* Burrell, 1 C. B. 402.

reorganizations, themselves, appraisals of rental values must be considered.[8] That such determinations recur with some frequency demonstrates their practical possibility.

The petitioner contends, however, that evidence of rental value for a 40-year period, no matter how certain it may be, is inadequate to enable a court to establish the damages for the entire 969 remaining years. Its argument is that one cannot be sure the truncated portion will not show sufficient gain to absorb all losses. Since certain proof for distant years cannot be produced, this objection leaves the lessor to qualified opinion evidence as to annual rental value, discounted for the term to show present damage. Such an opinion necessarily proceeds from presumably adequate knowledge of what lessees, desiring but not requiring the facilities, would be willing to pay for a new lease and lessors, in a similar attitude toward renting, to accept for the remainder of the term. While such evidence is admissible for consideration in forming a judgment upon damages, it has little, if any, probative force beyond the immediate years. Certainly such opinion evidence alone cannot be permitted to fix rental value for purposes of damages in the indefinite future. The final objective of the proof is not how much the remainder is worth now but what damages the lessor has suffered. For this he is awarded compensation. The measure of that damage is rent less rental value, a matter of judgment to be reached in the light of pleading and proof supplemented by judicial knowledge.

The law for purposes of damages does not treat a broken lease of a thousand years as though it ran only for a limited time, the damages for which are measurable. But since evidence of the damage is necessarily limited to a time of "definite forecasts" the rule of rental value permits the use of data for only a limited number of years to determine damages. The number of years to be considered depends upon the fullness and quality of the evidence offered to establish the damages. Hence, whether a limited term beyond the reach of forecasts or the whole term is to be used as a base for rental value, the evidence of earnings would be projected

[8] E. g. New York, New Haven & Hartford Railroad Company Reorganization, 239 I. C. C. 337, 351, 386, 387, 389, 453; In re Chicago, Milwaukee, St. Paul and Pacific R. Co., No. 60463, N. D. of Ill., Eastern Division, slip opinion of October 21, 1940, p. 24 *et seq;* same, 239 I. C. C. 485, 537, 553; Erie Railroad Company Reorganization, 239 I. C. C. 653, 685, 689.

the same number of years. This, we think, is what was meant by the circuit court of appeals when it treated the lease "in effect" as one with a term within the range of predictability as to rental value.

However nebulous the concept of a long lease may be, it is not a fiction but an actual instrument. Nothing appears in the record to suggest that the rental agreed upon was other than a reasonable return upon the value of the demised property, fairly negotiated. At the time the lease was executed, it is fair to assume the parties thought the annual rent reserved and rental value were the same. Without proof to the contrary only nominal damages would be allowed the claimant. And, until something else is shown, courts are entirely justified in assuming that for the long years ahead the rent and the rental value are the same.[9] As a consequence, evidence of rental value smaller in amount than the rent reserved for a term shorter than the remainder of the lease is, in the absence of testimony as to other years, proof of the damages for the years covered. Since the presumption is that the rent and rental value for the remainder of the term are the same, the damage proven is to be considered as all the damage for the rejection of the lease.

Second. The petitioner also contends that the circuit court of appeals erred in setting aside the district court's decree refusing the claim on the ground that the evidence, detailed above, did not satisfy the mind as to the amount of damages. In the view of the trial court, there was a failure of proof. The correctness of the judgment of the appellate court in directing an allowance of the claim depends not upon its power, which we think is clear,[10] but upon its conclusion as to the persuasive character of the evidence, whether it is too speculative, whether it showed the damage to reasonable certainty. As there was no significant dispute over the facts proven, the conclusion as to the sufficiency of the evidence was for the reviewing court. We deal, in this review, with the method of the proof of damages, not the measure. Narrowed even more, the issue is whether the evidence offered justifies an award, whether the quantum of proof produced forms an adequate basis for a reasoned judgment.

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[9] 2 Sedgwick, Damages, 9th Ed., § 610.

[10] Cf. Ridings *v.* Johnson, 128 U. S. 212, 218; United States *v.* Rio Grande Irrigation Co., 184 U. S. 416, 423.

Future rental value cannot be susceptible of precise proof. As it depends, so far as the amount of damages for breach of a lease is concerned, upon future profits, it partakes of the nature of loss of earning capacity or of credit. To require proof of rental value approaching mathematical certitude would bar a recovery for an actual injury suffered. All that can be done is to place before the court such facts and circumstances as are available to enable an estimate to be made based upon judgment and not guesswork.[11] Every breach of an anticipatory obligation, and every appraisal of damage involving the present value of property involves a prediction as to what will occur in the future. Present market value of property is but the resultant of the prediction of many minds as to the usability of property and probable financial returns from that use, projected into the future as far as reasonable, intelligent men can foresee the future.

The proof of future profits by the evidence of past profits in an established business gives a reasonable basis for a conclusion.[12] It is true that this business changed from trolley to bus within two years of the end of the base period and that management changed from lessee to lessor but we think the fact of transportation in the same communities for more than a quarter of a century sufficed to give the operation the classification of an established business. Here different methods of operation or normal changes in the executive staffs do not seem sufficient to interfere with the probative value of past experience. Franchises and property of street railways and bus lines are difficult of appraisal. Nothing is more indicative of their value for lease or sale of the fee than past earnings. If we were to adopt the view that the interest conveyed is a defeasible fee,[13] its defeasance dependent upon a condition such as nonpay-

[11] Story Parchment Co. *v.* Paterson Co., 282 U. S. 555, 563; Eastman Kodak Co. *v.* Southern Photo Co., 273 U. S. 359, 379; Eckington & S. H. R. Co. *v.* McDevitt, 191 U. S. 103, 112, 113; cf. dicta in United States *v.* Behan, 110 U. S. 338, 344; see Restatement Contracts, § 331, particularly comment (a); United States Trust Co. *v.* O'Brien, 143 N. Y. 284, 290; Ball *v.* Pardy Construction Co., 108 Conn. 549, 551; Commonwealth Trust Co. *v.* Hachmeister Lind Co., 320 Pa. 233; 1 Sedgwick, Damages, 9th Ed., § 170(a) *et seq.*; 1 Sutherland, Damages, 4th Ed., § 67.

[12] 5 Williston, Contracts, Rev. Ed. § 1346 A; Bagley *v.* Smith, 10 N. Y. 489, 498; Dickinson *v.* Hart, 142 N. Y. 183, 188; Macan *v.* Scandinavia Belting Co., 264 Pa. 384, 392; Commonwealth Trust Co. *v.* Hachmeister Lind Co., 320 Pa. 233, 242.

[13] Ocean Grove Camp Meeting *v.* Reeves, 79 N. J. L. 334, 338-39.

ment of annual instalments of the purchase price, the same difficulties exist. The unknown subtrahend would be the present value, instead of the rental value. Evidence of value would be made up of the items of proof. One of the most important of these, in the case of property such as here involved, would be past earnings.

This Court has sustained recoveries for future profits over four years based solely upon evidence of the profits of an established business for the past four years. We there approved an instruction which told the jury, "Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate".[14]

The ways compensatory damages may be proven are many. The injured party is not to be barred from a fair recovery by impossible requirements. The wrongdoer should not be mulcted, neither should he be permitted to escape under cover of a demand for nonexistent certainty.[15] Damages for breach of the lease were in contemplation of the parties when the contract was made.[16] The lease contained a covenant of reentry without prejudice to right of action for arrears of rent or breach of covenants. The provision in the Bankruptcy Act gives a new right of recovery in bankruptcy only. This right of recovery is an unsecured claim of the character of a claim for a deficiency above the value of inadequate collateral.

Certainty in the fact of damage is essential. Certainty as to the amount goes no further than to require a basis for a reasoned conclusion.[17] The certainty of the evidence as to damages for rejection of a lease depends upon the same tests as in other situations where damages are difficult of proof. This Court, recently, in an infringement case[18] was required to appraise the value of opinion evidence as to the part of profits attributable to the use of a pirated play, an obviously elusive fact. No expert thought any greater

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14 Eastman Kodak Co. *v.* Southern Photo Co., 273 U. S. 359, 379.

15 Story Parchment Co. *v.* Paterson Co., 282 U. S. 555, 564, 565; Eastman Kodak Co. *v.* Southern Photo Co., 273 U. S. 359, 379; Hetzel *v.* B. & O., 169 U. S. 26, 37, 38.

16 Hadley *v.* Baxendale, 9 Exch. 341.

17 Story Parchment Co. *v.* Paterson Co., 282 U. S. 555, 562, 563; 1 Sedgwick, Damages, 9th Ed., § 170; United States Trust Co. *v.* O'Brien, 143 N. Y. 284, 289.

18 Sheldon *v.* Metro-Goldwyn Corp., 309 U. S. 390, 406-408.

percentage than ten should be attributed to the play. The lower court allowed twenty so that the award might by no possibility be too small. We approved because "what is required is not mathemathical exactness but only a reasonable approximation. That, after all, is a matter of judgment . . ."

Satisfactory evidence was presented for the three years of actual operation of the properties covered by this lease. We think that prior earnings of the same property over fourteen years was a fair base to use to project the estimate of the earnings for the eight years of future operation. The failure to produce further evidence, either through experts or transportation surveys, was not fatal to respondent's case, even though such evidence is admissible. We see no reason to disagree with the conclusion of the circuit court of appeals that under the evidence presented the damages for eight years might be predicted with a "fair degree of certainty."

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 38.—October Term, 1940.

Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, Trustees of the Property of the New York, New Haven and Hartford Railroad Company, Debtor, Petitioners,
vs.
Connecticut Railway & Lighting Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 6, 1941.]

Mr. Justice Frankfurter dissenting.

On January 3, 1939, this Court unanimously decided that the "actual damage or injury" caused the lessor through the disaffirmance by the trustees of the New Haven of the lease now in controversy was a provable claim. *Connecticut Ry.* v. *Palmer*, 305 U. S. 493. If Congress had intended to rule out the legal provability of a claim for damages arising through the disaffirmance of what remains of a 999-year lease it could easily have done so, instead of providing for proof of the damages flowing from the termination of such an unexpired lease. And if, upon the prior consideration of the status of this very lease, this Court had intended to rule that loss due to the disaffirmance of the unexpired term of 969 years is in the nature of things beyond rational proof, it surely would not have taken twelve pages to avoid saying so. Both Congress and this Court have thus sponsored the conviction that proof of some damage is not outside the adjudicatory process.

But what is to be assessed is the value of a terminated long-term lease and not the value of an included short-term. Therefore, neither the decision of the district court nor that of the circuit court of appeals in reversing it seems to me satisfactory. Although the two courts reached contradictory conclusions, their views appear to suffer from the same intrinsic vice. Starting with man's inability to pierce into a future of 969 years, both courts deemed the present value of a lease running for such a period beyond calculable fore-

cast. Therefore, Judge Hincks said in effect, when an end is put to the benefits accruing from such a lease, the loss to the lessor cannot be translated into dollars and cents. Judge Patterson, on the other hand, treated the lease as though it were a lease for an ascertainable, included short term, and deemed eleven years as the limit for sure judgment. Since the lease is not a short-term lease, it is, according to the district court, nothing for purpose of giving rise to damages. Since the lease is for too long a term, we will snip off an included short term as though it were a short-term lease, concluded the circuit court of appeals.

Both these dispositions result in avoidance, through over-simplification, of an extremely complicated problem which Congress has put up to the courts. Since neither the district court nor the circuit court of appeals applied the directions of this Court in *Connecticut Ry.* v. *Palmer, supra,* however difficult and subtle they may have been, neither disposition should stand. The case should be sent back to the district court where an opportunity should be given to make proofs appropriate to the nature of the problem to be solved, namely, ascertainment on a tough business basis of the damage that sprang into existence from the disaffirmance of the remaining 969-year term rather than from the disaffirmance of a supposed 11-year lease.

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vs.
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On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 6, 1941.]

Mr. Justice Douglas, dissenting.

Mr. Justice Black and I are of the view that respondent's proof was wholly inadequate to establish under § 77(b) of the Bankruptcy Act the extent of its "actual damage or injury" as a result of the rejection of this lease, since the evidence offered failed to show what was "the present value of the rent reserved less the present rental value of the remainder of the term"—the measure of damages established for this very claim in *Connecticut Railway & Lighting Company* v. *Palmer*, 305 U. S. 493, 504.

We are dealing here with an unexpired term of 969 years. But the claim allowed is for a term which does not cover that span. It covers only an unexpired term of 11 years. For the reasons stated in *Kuehner* v. *Irving Trust Co.*, 299 U. S. 445, we think that if Congress had provided in § 77 that lessors should not be allowed to prove for damages in excess of an 11 year unexpired term, the limitation would be constitutional. Such legislation would have a firm constitutional basis in the bankruptcy power. But the making of such a limitation is a legislative, not a judicial, function. In view of the wording of § 77(b) we do not think this Court has the power to substitute the value of one property interest for the value of an entirely different one. Sec. 77(b) says that "actual damage or injury" shall be allowed. Yet it would be a mere coincidence if "actual damage or injury" for an 11 year term were the "actual damage or injury" for a 969 year term. Hence the District Court correctly refused to substitute any lesser term for the one here in

question. No authority, we believe, can be found which can justify speculating a claimant into a loss through the easy assumption that he had a property interest which in fact he did not have.

There is a related objection to the allowance of this claim. It is plain that any attempted computation of future rental values of this property for the next 969 years would at best be a mere flight "into the realm of pure speculation" which this Court condemned when the case was here before. 305 U. S. 493, 505. From our point in history 969 years hence is perpetuity. It covers a longer span than from 1941 A. D. to 500 years before Columbus discovered America. To project past earnings of a present enterprise through such vicissitudes of time would be to assume a static quality in society which even a decade of history would disprove. This was tacitly admitted by respondent before the District Court. The Circuit Court of Appeals recognized the impossibility of such a task. It therefore produced a substitute method. It computed the annual estimated values for each future year for as long a period as it could venture an estimate. That, however, misses the nature of the problem. Under the rule laid down by this Court, the great unknown in such cases is the "present rental value of the remainder of the term." The actual damage, if any, to the lessor is suffered all at once. For § 77, like former § 77B (*City Bank Farmers Trust Co.* v. *Irving Trust Co.*, 299 U. S. 433, 440) extends the doctrine of anticipatory breach (*Central Trust Co.* v. *Chicago Auditorium Association*, 240 U. S. 581) to leases of realty. Where there is such a breach "compensation therefor may be recovered at once for the whole loss, though the consequence be a continuing one, if the future damage resulting therefrom can be ascertained with certainty." *James* v. *Kibler's Adm'r*, 94 Va. 165, 173. The liability of the lessee for damages is single, not multiple. But § 77(b), unlike some state rules (*Hermitage Co.* v. *Levine*, 248 N. Y. 333), calls for an ascertainment of the full deficiency not at the end of the term but on rejection of the lease.

Lessors claiming damages under § 77(b), like claimants in ordinary bankruptcy proceedings (*Rasmussen* v. *Gresly*, 77 F. (2d) 252, 254; *Whitney* v. *Dresser*, 200 U. S. 532), carry the burden of establishing the existence and amount of the claim. Their proof must satisfy the "usual rules as to the measure of damages"; they

"must show damages to reasonable certainty". *Connecticut Railway & Lighting Company* v. *Palmer, supra,* at p. 505. While absolute certainty is not required where a claim for damages is sought (*Hetzel* v. *Baltimore & Ohio R. R. Co.,* 169 U. S. 26, 37), the evidence must be sufficient for the exercise of an informed judgment as to the amount. Where the existence or extent of the damage is a matter of mere conjecture or guess work, the claim will be denied. *Pennsylvania Steel Co.* v. *New York City Ry. Co.,* 198 Fed. 721, 759. When the instant case was here before, the *Pennsylvania Steel Co.* case was cited for the statement, "The difficulties of proof are well recognized." 305 U. S. at 504. In the *Pennsylvania Steel Co.* case damages for breach of a lease with an unexpired term of 995 years were disallowed in receivership proceedings, the court saying (p. 759): "Who could foretell the results of operation by the owner, the growth of the city, improvements in motive power, or reductions in cost? Who could foresee whether a lease could be made to another railroad company or the terms thereof? . . . The claim for such damages was properly disallowed because it was uncertain in amount and there was no method of making it certain."

Those observations are peculiarly apt when applied to the facts in this record. Here there is no evidence as to market value. Cf. *Metropolitan Bldg. Co.* v. *King County,* 62 Wash. 409. Nor has there been any fair, *bona fide* reletting. Cf. *James* v. *Kibler's Adm'r, supra.* In this record there is no substantial evidence as to value except estimated past earnings. Useful as past earnings may be in certain situations where a short and limited forecast is being made (*Eastman Kodak Co.* v. *Southern Photo Materials Co.,* 273 U. S. 359) they are indeed treacherous when used as the sole basis for appraisal.[1] The value of a going enterprise is dependent on earnings. A forecast of earnings must take into consideration the numerous and variable factors which affect income-producing capacity.[2] Those factors vary from business to business. Here we are dealing with passenger transportation by bus. Certainly any forecast of earnings should embrace an expert study of problems peculiar to this

1 1 Bonbright, Valuation of Property, c. XII.

2 Bonbright, *op. cit., supra,* note 1; Dewing, Financial Policy of Corporations, pp. 319 *et seq.;* Graham & Dodd, Security Analysis, c. I; Kniskern, Real Estate Appraisal & Valuation, pp. 235 *et seq.;* Mason, The Street Railway in Massachusetts, c. 6; McMichael, Long & Short Term Leaseholds.

field—the territory served, population trends, competitive conditions, the record of companies in comparable territory, and the like. Any estimate which wholly ignores such factors and relies entirely on past earnings ignores the very conditions which alone can impeach or sustain the credibility of past earnings as a measure of future earnings.[3] Cf. *Hammond Lumber Co.* v. *County of Los Angeles,* 104 Cal. App. 235.

The problem of determining the present value of this unexpired term of 969 years is not different from the problem of valuing a fee interest.

The fact that this instrument is called a "lease" is no barrier to such an appraisal. For, as stated by this Court in *Union Pacific Ry. Co.* v. *Chicago, Rock Island & Pacific Ry. Co.,* 163 U. S. 564, 582, where a so-called "lease" was construed: "What it was styled by the parties does not determine its character or their legal relations." The court has not only the power but the duty to determine its real character by consideration of all its intrinsic and extrinsic characteristics. *Id.,* at p. 582. A lease renewable forever or a lease in perpetuity (as here) is the equivalent of a fee interest. It has been so treated in Connecticut, where the instant lease was made, for purposes of taxation. *Connecticut Spiritualist Camp-Meeting Association* v. *Town of East Lyme,* 54 Conn. 152, 155-156. As stated in *Piper* v. *Meredith,* 83 N. H. 107, 110, "it is well settled law that a perpetual lease upon condition conveys to the lessee a determinable or base fee." Or as stated in *Whittelsey* v. *Porter,* 82 Conn. 95, 102, a 999 year lease is "practically a fee defeasible only upon failure to perform certain conditions." And see *Montgomery* v. *Town of Branford,* 107 Conn. 697, 702; *Wells* v. *Savannah,* 181 U. S. 531; *Leary* v. *Jersey City,* 248 U. S. 328; *Trustees of Elmira* v. *Dunn,* 22 Barb. 402. The mere reversionary interest of the lessor in a perpetual lease is so remote and speculative as to defy valuation. See *Chicago West Division Ry. Co.* v. *Metropolitan West Side Elevated R. R. Co.,* 152 Ill. 519, 524-526. As stated by the Supreme Court of Errors of Connecticut, the reversion under a 999 year lease becomes a "mere imaginary estate". *Brainard* v. *Town of Colchester,* 31 Conn. 407, 411. Whatever may be the precise catalogue of all rights of the lessee (*Goodwin* v. *Goodwin,* 33 Conn.

[3] In the Matter of Breeze Corporations, Inc., 3 S. E. C. D. & R. 709; In the Matter of Mining & Development Corp., 1 S. E. C. D. & R. 786.

314; *Dennis Appeal,* 72 Conn. 369) and whatever may have been the business and legal reasons for use of the 999 year lease rather than the acquisition of the assets by merger, consolidation or otherwise,[4] it is plain that for all practical purposes the lessee retains such full control and such complete enjoyment of the property that he may properly be treated as the owner. Such a lease is in effect "a practical sale". *Lord* v. *Town of Litchfield,* 36 Conn. 116, 126.

Thus the problem of determining the present value of the unexpired term of 969 years is no different from determining the value of land in an action for breach of a contract to purchase it. There the rule is that the vendor may recover compensation for his actual loss measured by the difference between the price he was to receive[5] (less the amount paid) and the value of the land at the time of breach. 3 Sedgwick on Damages (9th ed.) §§ 1023 *et seq; In re Marshall's Garage,* 63 F. (2d) 759. In making that valuation the conventional rules governing appraisals of the worth of fee interests would be applicable. 1 Bonbright, Valuation of Property, chs. XIII, XIV.

In sum, whatever rule of damages is applied to this situation, the proof submitted is not adequate for appraisal of the property interest here involved without violating the well-established rule against allowance of speculative damages, announced by this Court on the first appeal. No reasons of policy have been suggested which justify deviation from those well-established principles. The fact that the "lease" extends over a period of almost ten centuries accentuates the necessity for close adherence to the rule, not for its relaxation.

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[4] McMichael, *op. cit., supra,* note 2, c. I; Meck & Masten, Railroad Leases and Reorganization, 49 Yale L. J. 626; Niehuss & Fisher, Problems of Long Term Leases, 2 Mich. Bus. Studies, Pamphlet 8; The Long Term Ground Lease: A Survey, 48 Yale L. J. 1400.

[5] Future payments would of course be reduced to present worth. Bondy v. Harvey, 218 App. Div. 126.